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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-156

JUAN POMPA ZARATE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 8, 1972. A petition for rehearing was denied on June 30, 1972, and, on July 18, 1972, a mo-

tion for leave to file a second petition for rehearing was denied. The petition for a writ of certiorari was filed on July 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the uncorroborated testimony of three accomplices was properly admitted, and, together with the government exhibits of marihuana, amphetamine and seconal, was sufficient evidence to support the conviction.

2. Whether the district court's failure to obtain a written consent from petitioner before permitting the trial to proceed with eleven jurors was under the circumstances reversible error.

3. Whether petitioner's representation by retained counsel was so incompetent as to constitute a violation of the Sixth Amendment.

4. Whether the indictment properly charged petitioner with aiding and abetting and with conspiracy as separate counts; whether the withdrawal by the court of part of the charge from jury consideration was an impermissible amendment of the indictment.

5. Whether the delay between arraignment and trial amounted in this case to an unconstitutional denial of a speedy trial.

6. Whether the recording by the F.B.I. of a telephone conversation between petitioner and another person, with that person's permission, violated the Fourth Amendment.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner, a Mexican citizen, was convicted of aiding and abetting the illegal importation into the United States of marihuana and amphetamine tablets (Counts 1 and 2), in violation of 21 U.S.C. (1964 ed.) 176(a) and 18 U.S.C. 2 and 545, and of conspiring to commit the substantive offenses (Counts 3 and 4), in violation of 18 U.S.C. 371. He was sentenced to ten years' imprisonment on Count 1 and five years' imprisonment on Count 2, the terms to run consecutively with each other, but to run concurrently with similar sentences on Counts 3 and 4. The court of appeals affirmed *per curiam* (Pet. App. A).

At trial, the government's principal witness was John Henry Garcia. He testified that he had known petitioner for approximately six months, having met him at the home of a narcotics dealer named Pablo Uvalle in Tiajuana, Mexico (Tr. 21-22). Garcia stated that he had been present on a number of occasions when petitioner had purchased drugs from Uvalle (Tr. 23-26). Garcia further testified that he was asked by petitioner to drive a vehicle containing narcotics to Los Angeles (Tr. 27-29); he finally agreed to do so (Tr. 28); accompanied by petitioner he went to Uvalle's residence, where he was given the keys to the car, which had earlier been brought across the border (Tr. 28). Garcia then picked up the car in San Ysidro, California, and drove it to the designated location in the Los Angeles area (Tr. 29).

Garcia also implicated petitioner in the transportation of a second vehicle which Garcia had driven from San Ysidro to Los Angeles, after getting the keys from Pablo Uvalle (Tr. 30). On this occasion Garcia stated that Uvalle had told him to "[b]e sure to tell Juan [petitioner] to get the car back to him as soon as possible, because there has been a delay on his other cars" (Tr. 30). Garcia had driven this car to his residence in Los Angeles and then had telephoned petitioner, who was in the area, and advised him that "he could pick up the car" (Tr. 31-32).

Garcia's testimony further revealed that, on a number of occasions, he had transported money from petitioner to Uvalle (Tr. 55). He spoke of one instance when he had delivered approximately $2000 to Uvalle in Mexico for petitioner (Tr. 33-37); petitioner had on that occasion asked Garcia to order for him "a load of mostly grams of marijuana" (Tr. 35) through Uvalle. Garcia stated that when he placed the order, Uvalle told him he had no driver; Dorve Croft, who had accompanied Garcia to Mexico, was then hired to drive the marihuana across the border and deliver it to petitioner (Tr. 38-39, 108-110). Croft was arrested at the border (Tr. 40, 110), and when he subsequently telephoned petitioner to ask for money to hire a lawyer (Tr. 116-118), he was advised by petitioner to "go see Pablo" (Tr. 117-118, 160-161). This telephone conversation was overheard and recorded by agents of the FBI with Croft's permission (Tr. 186-188). It took place on April 3, 1970, several weeks prior to the indictment, which was returned on April 29, 1970.

Petitioner took the stand on his own behalf and denied that he had ever had any dealings in narcotics with Pablo Uvalle (Tr. 193). He testified that the numerous calls from his residence to Uvalle's telephone were actually made to Pablo's wife, with whom he claimed to be romantically involved (Tr. 196-197, 210).

## ARGUMENT

1. Petitioner raises a number of objections which relate to the sufficiency and competency of the evidence.

(a) As we have summarized in the Statement, there was ample basis on the facts of this case for the jury to return a guilty verdict. Petitioner seems to suggest that, since the government's three principal witnesses were his accomplices and allegedly had an interest in shifting blame to him, their evidence either should not be considered, or, as we understand his argument, should be deemed inherently incredible. It is, however, well settled that the uncorroborated testimony of an accomplice may support a conviction. See, *e.g.*, *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *United States* v. *Williams*, 424 F.2d 1056 (C.A. 9), certiorari denied, 399 U.S. 905; *Wooten* v. *United States*, 380 F.2d 230 (C.A. 5), certiorari denied, 389 U.S. 942.

(b) Whether an accomplice's testimony is to be credited is a matter for the jury. Here, petitioner attempted on cross-examination to attack the witnesses' credibility by demonstrating that they, too,

were under prosecution. The jury chose to believe the testimony of the accomplices despite petitioner's extensive cross-examination on this point. The record does not support petitioner's conclusory allegations that promises (express or implied) were made by the government in exchange for fabricated testimony.

(c) Finally, petitioner challenges the following jury instruction given by the court (Tr. 249) :

> The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the evidence or who may appear to have some knowledge of matters in issue at this trial, nor does the law require the prosecution to produce as exhibits all papers and things mentioned in evidence.

As we understand the argument, petitioner now contends that this instruction was erroneous because the prosecution did not call expert witnesses to state whether certain government exhibits were in fact marihuana and amphetamine tablets. But expert testimony was unnecessary here; petitioner's counsel had stipulated that, "as to Exhibits 1A through 1I, if a qualified Customs Chemist were called and sworn, * * * he would testify that he has examined samples of [these exhibits], and in his opinion, they contain amphetamine tablets and seconal capsules" (Tr. 181). A similar stipulation was entered into with regard to the government's marihuana exhibits (Tr. 182). In these circumstances, neither the court nor the prosecution can be faulted for not requiring expert witnesses to take the stand.

2. Petitioner also argues that his conviction should be set aside because the district court, without his written consent, permitted the trial to proceed with eleven jurors. While Rule 23(b), Fed. R. Crim. P., calls for written consent in such a circumstance, on the record in this case petitioner should not be heard to invoke that rule, since he explicitly agreed to the eleven-man jury.

Following the luncheon recess on the first day of trial, only eleven jurors returned to the courtroom. The government attorney, after waiting approximately ten minutes, offered to proceed to trial with those jurors present. Petitioner's counsel agreed to proceed with eleven jurors if the missing juror did not return shortly. The court then addressed petitioner (Tr. 17C-17D):

> Mr. Zarate, you understand that you have a right to be tried by twelve jurors.
>
> The Defendant: Yes
>
> The Court: You may waive that right and we can go forward with eleven jurors, but you and your Counsel must agree to that. Your Counsel indicates that he is willing to proceed. The Government is willing to proceed. Do you have any objection to proceeding?
>
> The Defendant: No, sir.
>
> The Court: Are you willing to proceed with eleven jurors rather than twelve jurors?
>
> The Defendant: Yes.

The absent juror then appeared, and the trial commenced.

The following day, the same juror once again failed to appear. The record sets forth the following colloquy (Tr. 96-97):

> The Court: * * * Gentlemen, we entered into a stipulation in chambers with respect to proceeding in this matter with eleven jurors. Are you willing to continue with that stipulation? Mr. Valenzuela?
>
> Mr. Gott [Assistant U.S. Attorney]. The Government is willing.
>
> Mr. Valenzuela [Defense Counsel]: Yes, Your Honor.
>
> The Court: Mr. Zarate
>
> The Defendant: Yes, Your Honor.
>
> The Court: When she shows up, simply excuse her. The stipulation is granted; we will proceed with eleven jurors.

In view of this express consent to an eleven-man jury, the failure of the court to require petitioner's written stipulation to that effect, if technically in error, was beyond question harmless error which was not in any material way prejudicial. See *Horne* v. *United States*, 264 F.2d 40 (C.A. 5), certiorari denied, 360 U.S. 934; *Rogers* v. *United States*, 319 F.2d 5 (C.A. 7), certiorari denied, 375 U.S. 989; *Bayless* v. *United States*, 381 F.2d 67, 74-75 (C.A. 9). Compare *United States* v. *Guerrero-Peralta*, 446 F.2d 876, 877 (C.A. 9).

3. Petitioner next challenges the competency of his retained counsel, claiming that counsel improperly stipulated to the fact that the government exhibits

contained marihuana, amphetamines and seconal. The stipulation, however, simply reflects a tactical decision by defense counsel not to object to the exhibits, but to rely instead on the defense that petitioner had not participated in the smuggling scheme and had no knowledge of the narcotics. Petitioner's disagreement with his counsel's judgment and strategy on this point is not adequate ground to conclude that he had ineffective assistance of counsel. *Bruce* v. *United States*, 379 F.2d 113, 117 (C.A.D.C.). The stipulation was not, as petitioner claims (Pet. 8), equivalent to a guilty plea. It still left to be proved at trial whether petitioner had knowledge of the alleged illegal importation and, with such knowledge, did actually aid and abet others engaged in the unlawful activity. See generally *United States* v. *Dorsey*, 449 F.2d 1104, 1107-1108 (C.A.D.C.).

4. Petitioner also challenges his indictment, as erroneously charging him in a number of counts with essentially a single offense arising out of the same transaction. He also complains that the indictment was improperly amended by the trial court. Both of these arguments are insubstantial.

a. Aiding and abetting the commission of a substantive offense and conspiring to commit that offense are, contrary to petitioner's contention, two separate offenses, even though the acts comprising the substantive counts are included in the indictment as overt acts under one or more conspiracy counts. See *Pereira* v. *United States*, 347 U.S. 1, 9-12; *United States* v. *Cole*, 449 F.2d 194, 201, n.4 (C.A. 8).

b. The trial court did not improperly amend the indictment. When presenting the indictment to the jury, it deleted therefrom certain of the alleged overt acts which related solely to a co-indictee, whose cause had been severed prior to trial. As this Court held in *Salinger* v. *United States*, 272 U.S. 542, 548-549, this action does not constitute an impermissible amendment of the indictment, provided (as was the case here) nothing is added.

5. Petitioner's additional claim that he was denied a speedy trial is also of little substance. The indictment in this case was returned on April 29, 1970; petitioner was arraigned on June 16, 1970; the case proceeded to trial on April 21, 1971; it concluded two days later. Between indictment and trial, pretrial discovery was being litigated (see Pet. 23). At no time during the approximately ten-month delay following arrest and arraignment did petitioner demand a speedy trial, nor did he once raise the issue in the trial court. Moreover, petitioner does not now point to any specifics in support of the conclusory allegation that he was prejudiced by the delay. Accordingly, this is not a case where the lapse of time prior to trial constituted reversible error. *Barker* v. *Wingo*, No. 71-5255, decided June 22, 1972.

6. Finally, petitioner contends that the F.B.I. recording of the telephone conversation he had with Croft violated his Fourth Amendment rights under *Katz* v. *United States*, 389 U.S. 347, and *Massiah* v. *United States*, 377 U.S. 201. Since the recording here preceded the return of the indictment, *Massiah*

is inapposite. Moreover, because the overhearing took place only after Croft had given his permission for the recording, the Fourth Amendment was not violated.[1] See *United States* v. *White*, 401 U.S. 745.[2]

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[1] Nor was there any violation of 47 U.S.C. 605, as petitioner apparently argues. Since Croft consented to the government's recording of the conversation, there was no "interception" prohibited by the statute. See *Hudson* v. *United States*, 429 F. 2d 1311, 1312 (C.A. 5), certiorari denied, 402 U.S. 965.

[2] Petitioner's remaining contentions are of little substance. He ascribes as error the failure of the court to require the government to submit a formal response to his request for a bill of particulars. But the government made one of its principal witnesses (Garcia), who could supply substantially all of the requested information (Tr. 16-17), available to the defense prior to trial to be interviewed. Since the court determined that the defense already knew the theory of the government's case (Tr. 17G), and had ready access to the information it sought, it did not act improperly in declining to require a formal response to the request for a bill of particulars. See *Duncan* v. *United States*, 392 F. 2d 539, 541 (C.A. 9), certiorari denied, 391 U.S. 935.

Nor was it error for the trial court to permit the prosecution to propound certain questions to petitioner relating to his Mexican citizenship. The assertion that such questioning—which was limited to asking petitioner his nationality and whether he had the proper documents to remain in this country (Tr. 212-213)—was somehow prejudicial is without any factual support or explanation.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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